

2-28-07

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION**

IN RE:	:	
	:	
JAMES DELL WADDELL and	:	Case No. 06-41365-PWB
WHITNEY M. WADDELL,	:	
	:	
Debtors.	:	
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JAMES DELL WADDELL and	:	Contested Matter
WHITNEY M. WADDELL,	:	
	:	
Objectors,	:	
vs.	:	
	:	
INTERNAL REVENUE SERVICE,	:	
	:	
Respondent.	:	
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**ORDER WITH REGARD TO PROOF OF CLAIM
OF INTERNAL REVENUE SERVICE (CLAIM NO. 6)**

On September 18, 2006, the Internal Revenue Service filed proof of claim 6 asserting a claim with regard to 1993 and 1994 income taxes with components as follows:

Unsecured Nonpriority Claim	\$12,142.63
Unsecured Priority Claim	14,301.49
Secured Claim	<u>7,277.55</u>
Total	\$33,721.67

The proof of claim indicates that the IRS filed tax liens in Bartow County on December 31, 2001.

On December 21, 2006, the Debtors filed an objection to the secured portion of the claim,

asserting that the tax liens of the Internal Revenue Service cannot attach to their property because it is fully exempted. A hearing on the objection was scheduled for January 17, 2007.

Although it appears that counsel for the Debtors duly served the objection and notice of the hearing on the Internal Revenue Service by mailing it to the United States Attorney for this district, the United States Attorney General, the tax division of the Department of Justice, and the local insolvency unit in Atlanta, the Internal Revenue Service did not respond to the objection or appear at the hearing. Because no one appeared at the hearing in opposition to the objection, the Courtroom Deputy Clerk directed counsel for the Debtors to submit a proposed order sustaining the objection in accordance with the Court's usual practice, and no hearing was held.

By the time counsel for the Debtors submitted a proposed order, the IRS on February 5, 2007, had amended its proof of claim. The amended proof of claim reduces the amount of the secured claim to \$3,300 and increases the unsecured nonpriority claim to \$16,119.79. As amended, the components of the claim are as follows:

Unsecured Nonpriority Claim	\$16,119.79
Unsecured Priority Claim	14,301.49
Secured Claim	<u>3,300.00</u>
Total	\$33,721.28

It does not appear that the Debtors are entitled to avoid the lien of the Internal Revenue Service as a matter of law. A tax lien is a statutory lien, not a judicial lien that is avoidable under 11 U.S.C. § 522(f)(1). *E.g., In re Houze*, Case No. 99-13307 (Bankr. N.D. Ga. Nov. 21, 2003); A debtor cannot exempt property from a tax lien, "notice of which is properly filed," under 11 U.S.C. § 522(c)(2)(B). *In re Downey*, Case No. 05-44526 (Bankr. N.D. Ga. Sept. 27, 2006).

The Court is at a loss to understand why no one appeared to assert these positions on behalf of the Internal Revenue Service. The Court will direct chambers' staff to mail a copy of this Order to the personal attention of the United States Attorney for this District for such action as he sees fit. Notwithstanding the inexplicable failure of the United States to respond to the Debtors' objection or to appear at the hearing, however, it is not appropriate for the Court to enter an order granting relief against the United States on account of the failure of anyone to respond in this case when it appears that such relief is not available to the moving party as a matter of law.

The Debtor's schedules appear to show that the value of their property, net of secured claims that appear to have priority over the IRS' lien, is \$3,300, which is the amount the IRS asserts as a secured claim in the amended proof of claim. Based on this value, the secured claim of the IRS is properly allowable as asserted in the amended claim. This determination is without prejudice to the Debtors to renew their objection or to ask for reconsideration of allowance of the claim if they contend, based on additional evidence or further legal argument, that the claim of the IRS, as amended, should not be allowed as filed.

Based on, and in accordance with, the foregoing, it is hereby **ORDERED and ADJUDGED** that Claim No. 6 of the Internal Revenue Service be allowed, as amended, as follows: Unsecured Nonpriority Claim, \$16,119.79; Unsecured Priority Claim \$14,301.49; Secured Claim, \$ 3,300.00, for a total allowed claim of \$33,721.28.

The Clerk is directed to mail copies of this Order to the persons shown on the attached Distribution List.

IT IS SO ORDERED this 28th day of February, 2007


Paul W. Bonapfel
United States Bankruptcy Judge

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